LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 21 1970
ROBERT SEAVER, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. [redacted] 730

EMMERY MIHALY, as Registrar of Voters of the City and County of San Francisco, et al.,
Petitioners and Cross-Respondents

vs.

ELOUISE WESTBROOK, et al.,
Respondents and Cross-Petitioners

and

STEPHEN ADAMS,
Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

JOSEPH L. ALIOTO,
PETER J. DONNICI,
111 Sutter Street, Suite 1421,
San Francisco, California 94104,
Telephone: (415) 434-2100,
Attorneys for Elouise Westbrook, et al. Respondents and Cross-Petitioners.

PERNAU-WALSH PRINTING CO. SAN FRANCISCO

Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented for review	3
Constitutional and statutory provisions involved	3
Statement of the case	4
Argument and reasons for granting the writ sought by cross-petitioners	7
I. The court below was clearly correct in its ruling that a two-thirds vote requirement for the passage of local general obligation bonds by the electorate insidiously dilutes the rights of "yes" voters, thereby denying them equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution	9
A. The two-thirds vote requirement of Article XI, Section 18 patently discriminates against "yes" voters in bond elections and therefore denies such voters equal protection of laws absent a showing of a compelling state interest in support of the discrimination	9
B. The extraordinary majority provision in Article XI, Section 18 of the California Constitution is not necessary to promote a compelling state interest and therefore denies equal protection of the laws to "yes" voters in local bond elections	13
II. Respondents and cross-petitioners were denied equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution by the refusal of the court below to issue a writ of mandamus	19
A. The ruling of the California Supreme Court invalidating the two-thirds vote requirement for adoption of bond proposals by the electorate should have been applied to the parties and elections involved in the present litigation	19
B. Principles of sound constitutional adjudication require that at least, the litigants, before the court be accorded the benefits of decisions which define new federal rights	21
Conclusion	26

Table of Authorities Cited

Cases	Pages
Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966)	24
Bogert v. Kinzer (No. 10446, Feb. 17, 1970)	11
Carrington v. Rash, 380 U.S. 89 (1965)	7, 10, 14, 17
Cipriano v. City of Houma, 395 U.S. 701 (1969)	24, 25
City of Phoenix v. Kolodziejski, ... U.S. ....., 90 S.Ct. 1990 (1970)	8, 24, 25
City of Redondo Beach v. Taxpayers, Property Owners, etc., City of Redondo Beach, 54 Cal. 2d 126 (1960)	14
Connor v. Great Western Sav. & Loan Assn., 69 Cal.2d 850, 447 P.2d 609 (1968)	24
Desist v. United States, 394 U.S. 244 (1969)	8, 22
England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964)	23, 24
Eskridge v. Washington State Prison Bd., 357 U.S. 214 (1958)	20
Farmers Reservoir and Irrigation Co. v. McComb; and McComb v. Farmers Reservoir and Irrigation Co., 335 U.S. 809 (1948), 337 U.S. 755 (1949)	2
Gideon v. Wainwright, 372 U.S. 335 (1963)	20
Gray v. Sanders, 372 U.S. 368 (1963)	11, 12
Great Northern Ry. Co. v. Sunburst Co., 287 U.S. 358 (1932)	23
Griffin v. California, 380 U.S. 609 (1965)	22
Griffin v. Illinois, 351 U.S. 12 (1956)	20
Hadley v. Junior College District of Kansas City, Mo., 397 U.S. 50 (1970)	11, 12, 18
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	7, 10, 14
Hunter v. Erickson, 393 U.S. 385 (1969)	11
Jackson v. Denno, 378 U.S. 368 (1964)	20
Johnson v. New Jersey, 384 U.S. 719 (1966)	8, 22
Katz v. United States, 389 U.S. 347 (1967)	22
Kirkpatrick v. Preisler, 394 U.S. 526 (1969)	11

Pages

Kramer v. Union Free School District, 395 U.S. 621 (1969) 7, 8, 12, 13, 17

Lagiss v. County of Contra Costa, 223 Cal. App. 2d 77 (1963) 14
Lance v. Board of Education, 170 S.E.2d 783 (W. Va. 1969), cert. granted, ... U.S. ..... (1970) 24
Lane v. Wilson, 307 U.S. 268 (1939) 10
Linkletter v. Walker, 381 U.S. 618 (1965) 8, 20, 21

Mapp v. Ohio, 367 U.S. 643 (1961) 8, 21
Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 17
McBean v. City of Fresno, 112 Cal. 159 (1896) 14
McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969) 12
Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457 (1961) 24

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 17

Reynolds v. Sims, 377 U.S. 533 (1964) 7, 11, 14
Rimarcik v. Johansen, 310 F.Supp. 61 (D. Minn. 1970) 24

San Francisco Gas Co. v. Brickwedel, 62 Cal. 641 (1882) 14
Schneider v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 ..... 16, 17
Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 16
Sherbert v. Verner, 374 U.S. 398 (1963) 16
Simpson v. Union Oil Co., ... U.S. .....; 90 S.Ct. 30 (1969) 8, 23
Stoval v. Denno, 388 U.S. 293 (1967) 22

Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 16
Tehan v. United States, ex rel. Shott, 382 U.S. 406 (1966) 8, 22
Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 16

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1942) 17
Williams v. Rhodes, 393 U.S. 23 (1968) 11

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

Constitutions

California Constitution: Pages
Article XI, Section 18 ..... passim
Article XIII, Section 40 4

United States Constitution:
Fourteenth Amendment 6, 12, 19

Ordinances

City and County of San Francisco Ordinances:
No. 276-69 (File No. 335-69-2) 6

Rules

Rules of the Supreme Court of the United States:
Rule 21(1)(3)(4) 3

Statutes

28 U.S.C. 1257(3) 3

Texts

Beebe, Hodgman and Sutherland, Joint Powers Authority Revenue Bonds, 41 So. Cal. L. Rev. 19 (1967) 15

Scott and Hamilton, Extraordinary Majority Voting Requirements, 10 Public Affairs Report No. 4 (U. of Cal. 1969) 15

Stern & Gressman, Supreme Court Practice (4th ed. 1969), page 311 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 641

EMMERY MIHALY, as Registrar of Voters of the City and County of San Francisco, et al.,
Petitioners and Cross-Respondents,

vs.

ELOUISE WESTBROOK, et al.,
Respondents and Cross-Petitioners,

and

STEPHEN ADAMS,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

Petitioners Mihaly, *et al.* herein have, on August 25, 1970, filed their petition for a Writ of Certiorari to review a judgment and opinion of the Supreme Court of the State of California entered on June 30, 1970. Respondents Westbrook, *et al.* now come forward to oppose the granting of

the Writ. In the alternative, respondents Westbrook, *et al.* hereby cross-petition for a Writ of Certiorari and respectfully request that should this Court agree to review the decision of the Supreme Court of California, that it review the entire case including the refusal of that Court below to apply its newly articulated constitutional interpretation to the parties before it.

Accordingly, respondents Westbrook, *et al.* respectfully file this conditional cross-petition for a Writ of Certiorari to the Supreme Court of the State of California. (See: *Farmers Reservoir and Irrigation Co. v. McComb;* and *McComb v. Farmers Reservoir and Irrigation Co.,* 335 U.S. 809 (1948), 337 U.S. 755 (1949); Stern & Gressman, Supreme Court Practice, p. 311 (4th Ed. 1969).

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of California is reported in 2 Cal. 3rd 765 (dated June 30, 1970 as modified July 15, 1970). The opinion is reprinted in "Appendix A" of the Petition for Writ of Certiorari. (References herein to that opinion will be hereinafter cited as "Petition Appendix A, Opinion p. .....".)

JURISDICTION

The statement of jurisdiction by the petitioners herein is accepted. The judgment of the Supreme Court of California was filed and entered on June 30, 1970. As modified, that judgment became final on July 30, 1970. The petition

and the present cross-petition were filed less than ninety (90) days from June 30, 1970. The jurisdiction of this Court over the cross-petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1257(3) and Rule 21(1) (3) and (4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED FOR REVIEW

In addition to the two questions for review advanced by petitioners herein (Petition, pp. 2-3), cross-petitioners raise the following issue:

Accepting the decision of the California Supreme Court as correct in determining that the two-thirds vote requirement for passage by the electorate of local bond issues constitutes an invidious dilution of respondents' and cross-petitioners' right to vote in violation of the Fourteenth Amendment, should that decision apply retrospectively; or, at the very least, should that ruling and judgment apply to the individual voters and the particular elections before the Court in the present litigation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents and cross-petitioners Westbrook, *et al.* accept the statement of provisions involved as set forth by petitioners (Petition, pp. 3-4).[1]

---

[1]The requirement of a two-thirds vote in favor of a local bond issue for the adoption thereof by the electorate, which provision was ruled unconstitutional by the Supreme Court of California was contained in Article XI, Section 18 of the Constitution of the

STATEMENT OF THE CASE

Respondents and cross-petitioners Elouise Westbrook, Leilani Conley, Essie Webb, Osceola Means, Rudolfo Corpus and Eva Rosales (hereinafter referred to as "Westbrook, *et al.*") were at all times here relevant qualified and registered voters in the City and County of San Francisco, California. The petitioners herein (respondents below) are Emmery Mihaly, Registrar of Voters of the City and County of San Francisco, California; Robert J. Dolan, Clerk of the Board of Supervisors of the City and County of San Francisco, California; and Nathan B. Cooper, Controller of the City and County of San Francisco, California.

Westbrook, *et al.* initiated this action by filing an original petition for Writ of Mandamus in the Supreme Court of the State of California. They sought to compel the various public officials named in the action (petitioners herein) to certify that certain bond proposals for the financing of recreational facilities and schools, favored by a majority of the voters at an election in San Francisco on November 4, 1969, were thereby adopted and to require the officials to take all necessary steps to prepare and offer such bonds for sale.

After being duly called, the election here at issue was held in San Francisco, California, on Tuesday, November 4, 1969. Proposition A, which was duly and properly placed on the ballot for that election, was a municipal

---

State of California. Prior to the decision of the California Supreme Court, this provision was re-enacted in identical language as Article XIII, Section 40 of the state constitution. For purposes of convenience the provision will be hereinafter cited and referred to as "Article XI, § 18."

bond proposal for $9,998,000[2], the adoption of which would have provided funds for the creation of new recreational parks and the modernizing of present recreational facilities. Many of these recreational facilities are located or would have been located near the residences of Westbrook, *et al.* and are, or would have been utilized by them and their children. Proposition A received 103,997 "yes" votes (or 56.8% of the total votes cast) as opposed to 79,056 "no" votes (or 43.2% of the total votes cast). (Petition, Appendix A, Opinion, p. 3.)

Proposition B, which was duly and properly placed on the ballot for the November 4th election, was a municipal bond proposal for $5,000,000[3] which would have provided funds for needed school facilities in the neighborhood in which petitioners Leilani Conley, Essie Webb, Osceola (Washington) Means and their children reside. Proposition B received 95,842 "yes" votes (or 52.3% of the total votes cast) as opposed to 87,306 "no" votes (or 47.7% of the total votes cast). (Petition, Appendix A, Opinion, p. 3.)

Each of the respondents and cross-petitioners herein, as eligible registered voters, cast their votes in favor of

---

[2]The text of Proposition A, as it appeared on the ballot, read as follows: "Proposition A, Recreation and Park Bonds, 1969. To incur a bonded indebtedness of $9,998,000.00 for additions to and improvement of the Recreation and Park System of the City and County of San Francisco."

[3]The text of Proposition B as it appeared on the ballot read as follows: "Proposition B, School Bond Hunters Point Redevelopment Project, 1969. To incur a bonded indebtedness of $5,000,000.00 for school purposes to serve the Hunters Point Redevelopment Project including land acquisition, construction of new school buildings and grounds and improvements to existing school plant."

Proposition A and Proposition B in the November 4, 1969 election and thereby voted with the majority as to both proposals here at issue. Inasmuch as Proposition A and Proposition B each received a favorable majority vote, Westbrook, *et al.* (through their attorney) made demand upon each of the city officials here named to perform their ministerial duties to certify and recognize that the proposals had passed. However, those officials refused to accede to the above request, stating that the municipal bond proposals had not passed because both Proposition A and Proposition B had failed to receive the favorable vote of two-thirds of the electors. The officials expressly relied upon the two-thirds vote requirements of Article XI, § 18 of the California Constitution and Ordinance No. 276-69 (File No. 335-69-2) of the City and County of San Francisco. (Petition, Appendix A, Opinion, pp. 3-4.)

The Supreme Court of California issued an Alternative Writ of Mandamus on December 10, 1969 ordering the city officials here involved to show cause why a permanent peremptory writ should not be issued granting the relief sought by Westbrook, *et al.*

After extensive briefing and a hearing on May 15, 1970, the Supreme Court of California ruled, on June 30, 1970, that the two-thirds vote requirement of Article XI, § 18 unjustifiably and unreasonably diluted and debased the right to vote of Westbrook and all other voters who cast their ballots in favor of the bond proposals here involved; and further, that the provision denied such voters equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. (Petition, Appendix A, Opinion, p. 48.)

The California Court, however, refused to issue a peremptory writ of mandamus in this case stating that their decision would ". . . have prospective effect only . . . ." Thus Westbrook and the other voters who initiated this action to vindicate and remedy the unconstitutional dilution of their right to vote, and whose position was found to be legally meritorious, were denied all relief as to the very election which was the subject matter of the present litigation. (Petition Appendix A, Opinion, p. 49; See also concurring opinion of Justice Mosk joined by Justice Peters. Petition Appendix A, Opinion, pp. 52-57.)

ARGUMENT AND REASONS FOR GRANTING THE WRIT SOUGHT BY CROSS-PETITIONERS

The position of Westbrook, *et al.* in this present proceeding is, briefly, that the decision of the Supreme Court of California invalidating the two-thirds vote requirement of Article XI, § 18 as an invidious and unconstitutional dilution of the right to vote was a correct ruling. The Court properly found that this restriction on the franchise was invalid because it was not warranted by any compelling state interest. (Petition Appendix A, Opinion, p. 41.) Respondents and cross-petitioners hereby adopt and incorporate herein the excellent analysis of the California Court as to the issues raised by petitioners. In this respect, the decision of the California Court is consistent with a long line of rulings by this Court. *Carrington v. Rash,* 380 U.S. 89 (1965); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Kramer v. Union Free School Dist.,* 395 U.S.

621 (1969). Therefore, the petition for a Writ of Certiorari should be denied.

On the other hand, if the petition is granted for purposes of reviewing the above-mentioned ruling, this Court should also grant the cross-petition in order to determine the propriety of the California Court's refusal to extend the benefits of its newly articulated constitutional interpretation to the parties before it who, in that very litigation, urged and persuaded the Court to adopt the new principle. It is clear, that in such cases—even where this Court has refused a general retrospective application of the new interpretation, the parties to the "landmark" litigation defining federal constitutional rights and liberties have been accorded the benefits of the ruling involved. *City of Phoenix v. Kolodziejski,* ..... U.S. ....., 90 S.Ct. 1990, 1997 (1970). See *Mapp v. Ohio,* 367 U.S. 643 (1961); cf. *Linkletter v. Walker,* 381 U.S. 618 (1965); *Tehan v. United States, ex rel. Shott,* 382 U.S. 406 (1966); *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Desist v. United States,* 394 U.S. 244 (1969); See also, *Simpson v. Union Oil Co.,* ..... U.S. ....., 90 S.Ct. 30 (1969).

Respondents and cross-petitioners will discuss the above contentions *seriatim.*

I. THE COURT BELOW WAS CLEARLY CORRECT IN ITS RULING THAT A TWO-THIRDS VOTE REQUIREMENT FOR THE PASSAGE OF LOCAL GENERAL OBLIGATION BONDS BY THE ELECTORATE INSIDIOUSLY DILUTES THE RIGHTS OF "YES" VOTERS, THEREBY DENYING THEM EQUAL PROTECTION OF LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The two-thirds vote requirement of Article XI, Section 18 patently discriminates against "yes" voters in bond elections and therefore denies such voters equal protection of laws absent a showing of a compelling state interest in support of the discrimination.

Petitioners herein who argue in favor of the retention of the two-thirds vote requirement deny that Article XI, § 18 classifies voters. They contend that "yes" voters in bond elections do not comprise a well-defined class because they are not identified prior to their act of voting. This argument is patently unsound.

The "yes" voters whose votes are diluted by being given only one-half the weight accorded to "no" votes in bond elections are defined by their very act of voting. It is not essential that each such voter be identified by name, race, sex, economic status or geographical location. Nor is it important that a citizen may vote "yes" on one bond proposal and "no" as to another proposal. The essential issue is whether those who vote "yes" on a specific proposal in a particular election (such as respondents and cross-petitioners herein) are, because of the way in which they vote, classified and discriminated against.

Article XI, § 18 draws such a classification and, on its face, compels a discrimination in the weight given to "yes" votes in any such election. The lack of further identification of the disadvantaged class does not exempt

the California provision from scrutiny under the equal protection clause, for the federal Constitution ". . . nullifies sophisticated as well as simple-minded modes of discrimination". *Lane v. Wilson,* 307 U.S. 268, 275 (1939); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

Westbrook, *et al.* contend that discrimination against voters on the basis of the way in which they vote raises a presumption that equal protection has been denied just as do such discriminations based on race, sex, economic status or geographical location. *Carrington v. Rash,* 380 U.S. 89 (1965). This is not to say there is an inherent right to vote upon all issues concerning governmental expenditures. Rather, it is our position that *if* and *when* the law entrusts decision-making power to the electorate, the voting process must be free from invidious discriminations based upon race, sex, economic status, geographical location *or* the position taken by the voter on the issue presented.

It is clear from the history of Article XI, § 18 that the State of California intends and compels decisions concerning bonded indebtedness to be entrusted to the electorate. And ". . . once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." The state is forbidden from imposing invidiously discriminatory standards on the right of suffrage. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 665 (1966).

The two-thirds voting requirement, then, was properly viewed by the California Supreme Court as an unconstitutional condition upon the State's submission of bonded

indebtedness decisions to the electorate. Thus, the two-thirds requirement was invalidated thereby permitting the electoral process to operate on a one man—one vote basis with respect to bond elections.

Petitioners also argue that even if Article XI, § 18 is found to discriminate against "yes" voters, such a classification is not a denial of equal protection. They contend that the presumption of constitutionality applies to the two-thirds vote requirement and that Article XI, § 18 must be sustained so long as it is supported by any "rational basis". Thus it is asserted that the "compelling state interest" test for validity of a voting regulation applies only in cases where the franchise is denied completely, not in cases where voting power is merely diluted. Moreover, they deny that any dilution has occurred. This analysis, adhered to in the recent Idaho Supreme Court decision *Bogert v. Kinzer* (No. 10446, Feb. 17, 1970), is completely erroneous and in disregard of the dictates of this Court. For example, such a view ignores rulings by this Court condemning state election requirements which operate to the disadvantage of particular groups of voters. *Hunter v. Erickson,* 393 U.S. 385 (1969); *Williams v. Rhodes,* 393 U.S. 23 (1968).

Moreover, all of the reapportionment cases including *Gray v. Sanders,* 372 U.S. 368, 379 (1963); *Reynolds v. Sims,* 377 U.S. 533, 555 (1964); *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969); and *Hadley v. Junior College District of Kansas City, Mo.,* 397 U.S. 50 (1970) recognize that the debasement or dilution of an individual's voting power is as much a legal injury to his right to vote as would be the complete denial of the franchise to him.

Thus, when the *weight* of a man's vote is abridged, the Fourteenth Amendment requires that those who support the law in question bear the burden of demonstrating that the voter discrimination is *necessitated* by some *compelling state interest*. As the Supreme Court most recently observed in the *Hadley* case:

> "But once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded' ". 397 U.S. at p. 59; *Gray v. Sanders, supra.*

In another recent case, *Kramer v. Union Free School District,* 395 U.S. 621 (1969) this Court examined a regulation which unjustifiably denied the franchise to a class of citizens. In *Kramer* the Court observed that for purposes of appraising the validity of an election regulation, the *denial* of the right to vote must be equated with the *dilution* of "the effectiveness of some citizens' votes". 395 U.S. at p. 626. Both forms of limitations on the right to vote—*denials* and *dilutions* of voting power—must be closely scrutinized by the court. Therefore it is clear that discriminatory provisions which *deny or dilute* an individual's right to vote must be held unconstitutional unless the state can bear the burden of showing a compelling interest which necessitates the classification.

The result reached by the California Supreme Court below is not inconsistent with *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969). In that case, the state law in question neither denied nor diluted the rights of voters. *McDonald* concerned merely

the availability of absentee ballots. The Supreme Court recognized that the Illinois absentee ballot provision was designed to make voting more readily available to some groups who are otherwise unable to get to the polls. Thus, there was no need for the Court to closely scrutinize the state law which maximized and facilitated the right to vote. In our case, however, Article XI, § 18 dilutes and debases the voting rights of a large class of citizens (any eligible voter who votes "yes" in a local bond election) by according their votes less weight than that given to "no" ballots. (Indeed, each "no" vote is given twice the weight of each "yes" vote.) This discriminatory arrangement cannot be constitutionally permitted unless the State can demonstrate that it is *necessary* to the achievement of a compelling state interest. (See the *Kramer* case, 395 U.S. at pp. 626-627.) As will be shown below, the two-thirds vote requirement of Article XI, § 18 cannot pass this test.

B. The extraordinary majority provision in Article XI, Section 18 of the California Constitution is not necessary to promote a compelling state interest and therefore denies equal protection of the laws to "yes" voters in local bond elections.

At stake in the present case is the equality of a group of citizens' right to vote and to have an ". . . effective voice in the governmental affairs which substantially affect their lives." *Kramer v. Union Free School District, supra,* 395 U.S. at p. 627. The respondents and cross-petitioners herein include parents of children who are in desperate need of the educational and recreational facilities which were to be authorized by the San Francisco bond proposals (Propositions "A" and "B"). More importantly, Westbrook, *et al. as "yes" voters,* were denied an equal voice in the electoral process.

This Court has observed:

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims, supra,* 377 U.S. at pages 561-562.

See also: *Harper v. Virginia Board of Elections,* 383 U.S. 663, 667 (1966).

In *Carrington v. Rash, supra,* 380 U.S. at p. 94, the Supreme Court recognized that the right to vote is one of the federally protected liberties which is "so vital to the maintenance of democratic institutions."

The critical issue, then, can be stated as follows: is the dilution of "yes" votes as required by Article XI, § 18 necessary to the promotion of a compelling state interest? To answer this question it is first necessary to articulate the state interest involved. Numerous cases cited below by counsel for petitioners herein demonstrate that the *sole purpose* of the two-thirds vote requirement in bond elections was to prevent the over-accumulation of bonded indebtedness by one political subdivision, *McBean v. City of Fresno,* 112 Cal. 159, 164 (1896); *San Francisco Gas Co. v. Brickwedel,* 62 Cal. 641, 642 (1882); *City of Redondo Beach v. Taxpayers, Property Owners, etc., City of Redondo Beach,* 54 Cal. 2d 126, 131 (1960); *Lagiss v. County of Contra Costa,* 223 Cal. App. 2d 77, 85 (1963). These cases make it clear that the two-thirds vote requirement was viewed as a method for discouraging bonded indebtedness and preventing a "spend now-pay

later'' attitude whereby local cities or counties would irresponsibly over-extend their financial commitments.

We need not here inquire whether economic conditions in the late nineteenth century justified such a step. We must look instead to present conditions. The issue here, then, is: is it *necessary* to restrict the voting rights of citizens in order to protect society from the financially irresponsible accumulation of bonded indebtedness by political subdivisions? The answer is, clearly, "no"!

First, the defeat of a bond proposal does not necessarily curb government spending, but rather merely stimulates more expensive methods of financing needed programs through non-voted indebtedness. See, for example, Beebe, Hodgman and Sutherland, *Joint Powers Authority Revenue Bonds,* 41 So. Cal. L. Rev. 19 (1967).

Secondly, the dynamics of the modern bond market protect against financial irresponsibility by local political subdivisions. Up to date financial and credit ratings are available for appraising and rating every local governmental unit. Bond investors will not buy the bonds of those cities, counties or districts which have over-committed themselves. Compare: Scott and Hamilton, *Extraordinary Majority Voting Requirements,* 10 Public Affairs Rept. No. 4 (U. of Calif. 1969).

By any knowledgeable and objective analysis, the two-thirds vote requirement of Article XI, § 18 does not promote a compelling state interest. It is an inefficient and unworkable restriction on the right to vote which has no redeeming social or economic advantages. It is not even effective in preventing governmental units from financially over-committing themselves if two-thirds of the voters choose to do so.

When measured against the definition of "compelling state interest," the extraordinary majority requirement of Article XI, § 18 clearly fails. In *Sherbert v. Verner,* 374 U.S. 398, 406-409 (1963) this Court gave an authoritative definition of the appropriate standard:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. *It is basic that no showing merely of a rational relationship to some colorable state interest would suffice;* in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations'. *Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430.
>
> "No such abuse or danger has been advanced in the present case".
>
> . . . . .
>
> "Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance . . . it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, *it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.*" Cf. Shelton v. Tucker, 364 U.S. 479, 487-490, 81 S.Ct. 247, 251-253, 5 L.Ed. 2d 231; *Talley v. California,* 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L. Ed. 2d 559; *Schneider v. State of New Jersey,* 308

U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155; *Martin v. Struthers,* 319 U.S. 141, 144-149, 63 S.Ct. 862, 866, 87 L.Ed. 1313. (Emphasis added.)

Thus, to sustain the two-thirds vote requirement of Article XI, § 18 of the California Constitution, petitioners must bear the burden of proving that no alternative form of regulation can be devised which would guard against over-commitment of bonded indebtedness. This petitioners cannot do. For it is obvious that more effective alternative safeguards and limitations on bonded indebtedness (for example, an express debt limitation) are available *without the necessity* of abridging the constitutionally protected voting rights of "yes" voters such as the respondents and cross-petitioners herein. *Kramer v. Union Free School District, supra,* 395 U.S. at p. 627. The two-thirds vote requirement of Article XI, Section 18 cannot survive this meticulous judicial scrutiny. Compare: *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 643-644 (1942); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

In the final analysis, this case is controlled by *Carrington v. Rash, supra,* where a class of Texas citizens were denied access to the polls because of the state's fear concerning the way in which they would vote. Similarly, in our present case, California dilutes and debases the votes of one class of qualified and eligible citizens because they vote "yes" in bond elections. As this Court stated in *Carrington,* 380 U.S. 93-94:

> "The theory underlying the State's first contention is that the Texas constitutional provision is necessary to prevent the danger of a 'takeover' of the civilian community resulting from concentrated voting

> by large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. *Local bond issues may fail, and property taxes stagnate at low levels* because military personnel are unwilling to invest in the future of the area. We stress—and this a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as *all other qualified residents, have a right to an equal opportunity for political representation. Cf. Gray v. Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed. 2d 821. *'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.'* [T]he exercise of rights so vital to the maintenance of democratic institutions,' *Schneider v. State of New Jersey,* 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155, cannot constitutionally be obliterated *because of a fear of the political views of a particular group of bona fide residents.''* (Emphasis added.)

As was further stated in the recent *Hadley* case, 397 U.S. at pp. 54-55:

> ''When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election.''

The gross and extreme discrimination against "yes" voters expressly commanded by Article XI, § 18 of the California Constitution is not necessary to promote a compelling state interest and, therefore, denies equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution. The decision of the Supreme Court of the State of California is in accord with previous rulings by this Court. Thus the petition for writ of certiorari should not be granted.

II. RESPONDENTS AND CROSS-PETITIONERS WERE DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE REFUSAL OF THE COURT BELOW TO ISSUE A WRIT OF MANDAMUS.

A. The ruling of the California Supreme Court invalidating the two-thirds vote requirement for adoption of bond proposals by the electorate should have been applied to the parties and elections involved in the present litigation.

In his concurring opinion in the Court below, Justice Mosk (joined by Justice Peters) stated:

> "I concur in the court's conclusion that the two-thirds requirement for passage of bond issues is invalid, but I dissent from the majority's refusal to apply its decision to the litigants before the court.
>
> The majority tell the parties who initiated these proceedings, who used their talents and resources to seek and obtain a hearing in this court, and who invoked the constitutional principles upon which we here rely, that they are undeniably right, their concept of the law is totally vindicated—but they lose, their petition for a peremptory writ denied. This is indeed a Pyrrhic victory, or as John Dryden wrote

> in the 17th century: 'Even victors are by victories undone.'" (Petition, Appendix A, Opinion, pp. 52-53.)

This Court has struggled, on many occasions, with the difficult problems presented by the retrospective application of a new constitutional interpretation. It has recognized that some of its new rulings are so necessary for the vindication of a constitutionally protected interest, that the important principles there articulated must be accorded full retrospective application. See *Linkletter v. Walker,* 381 U.S. 618, 639 (1965) (at footnote 20 of the Court's opinion). Accordingly, the right to counsel at trial and other procedural protections for the accused in criminal cases have been applied retrospectively because they are such "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant." *Griffin v. Illinois,* 351 U.S. 12, 18 (1956); *Cf. Eskridge v. Washington State Prison Bd.,* 357 U.S. 214 (1958); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Jackson v. Denno,* 378 U.S. 368 (1964).

In our present case, the Supreme Court of California recognized and enthusiastically subscribed to this Court's frequent statements concerning the "fundamental" nature of the individual's right to vote, and to cast a ballot on equal terms with other eligible voters. (Petition, Appendix A, Opinion p. 24.) Thus, it could reasonably be argued herein that the ruling in this litigation establishing substantive federal constitutional protection for the fundamental right to vote should be given full retrospective effect just as has been given to newly announced fundamental procedural protections.

Cross-petitioners do not, however, here seek such a broad ruling. Instead they request merely the most minimal consideration from the Court below as has been given to parties in other litigation which has culminated in the enunciation of new federal constitutional principles. For even in those cases refusing general retrospective application of a new constitutional interpretation, that new principle has been applied to the parties who initiated and presented it to the Court in the "landmark" litigation. Thus, even though the exclusionary rule in *Mapp v. Ohio,* 367 U.S. 643 (1961) was denied general retroactive effect (see *Linkletter v. Walker, supra*) it was applied ". . . to reverse Miss Mapp's conviction" even though Mapp's conduct and her trial and conviction antedated the enunciation of the *Mapp* rule by this Court. *Linkletter v. Walker,* 381 U.S. at 622.

Similarly, in our case, Mrs. Westbrook and her coparties merely request that they be given the benefit of the "*Westbrook* rule". The relief they requested, certification of the approval of the bond issues (Propositions "A" and "B" in the November 4, 1970 San Francisco election) in accordance with the will of a majority of the voters should be granted.

B. Principles of sound constitutional adjudication require that at least, the litigants, before the court be accorded the benefits of decisions which define new federal rights.

Cross-petitioners do not here contend that the ruling of the Court below must be given full retroactive effect. Thus, the considerations articulated in *Linkletter, supra* such as (a) the purpose served by the new standards, (b) the state's reliance on the old standards, and (c) the ad-

ministrative difficulties which could result from retrospective application need not be considered here.

For even if we assume that each of the above articulated factors militates against general retroactive effect of the new ruling, the California Supreme Court erred in not applying the new rule—at the very least—to the litigants before it. Thus the defendant in *Griffin v. California,* 380 U.S. 609 (1965) was given the benefit of the *Griffin* rule even though that rule was otherwise denied retroactivity. *Tehan v. United States, ex rel. Shott, supra.*

Defendants Escobedo, Miranda, Wade and Gilbert were allowed the benefits of new constitutional interpretations announced in their cases, even though such interpretations were denied general retrospective application. *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Stoval v. Denno,* 388 U.S. 293 (1967). Compare: *Katz v. United States,* 389 U.S. 347 (1967) and *Desist v. United States,* 394 U.S. 244 (1969). The reason why parties (such as our present cross-petitioners) who are the litigants in the cases which articulate new principles, must be given the benefit of such new interpretations was best summarized by this Court in *Stoval v. Denno,* 388 U.S. at p. 301:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. *That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible*

> *effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions.* Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Emphasis added.)

To the same effect is this Court's more recent ruling in *Simpson v. Union Oil Co., supra,* 90 S.Ct. at p. 31.

The two United States Supreme Court cases cited by the Court below as support for permitting only "pure prospectivity of application are not controlling in our present case. In neither *England v. Louisiana Board of Medical Examiners,* 375 U.S. 411, 422 (1964) nor *Great Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358 (1932) did refusal to apply the new interpretation to the case at hand result in the denial of federal constitutional rights to the litigants there. Indeed, in *England,* this Court refused to apply its newly announced "abstention procedure", because to do so would have resulted in the dismissal of the federal claim, precluding the initiating litigant from utilizing the new procedural method for vindicating federal rights. As the Court stated:

> "On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal

> claims in the state courts was assertedly a view that Windsor required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action." (375 U.S. at 422-423.)

The California Supreme Court has itself previously given parties to "landmark" rulings the benefit of the newly enunciated principle even though general retrospective application was refused. California adopted this procedure when it eliminated governmental immunity, *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 359 P.2d 457 (1961), and again when it imposed liability upon institutions financing tract developments. *Connor v. Great Western Sav. & Loan Assn.*, 69 Cal.2d 850, 447 P.2d 609 (1968). Also, other state courts have adopted substantial changes in the law and applied the new doctrine to the case at hand while otherwise giving it only prospective application. (See, e.g., *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66, 75 (1966).

In conclusion, the "retroactivity-prospectivity" problem in the context of our present case presents a very difficult issue which this Court should resolve. Compare: *Rimarcik v. Johansen*, 310 F.Supp. 61 (D. Minn. 1970) with *Lance v. Board of Education*, 170 S.E.2d 783 (W. Va., 1969), *cert. granted*, ... U.S. ..... (1970). The relief sought by cross-petitioners herein is not inconsistent with this Court's rulings in *Cipriano v. City of Houma*, 395 U.S. 701 (1969) and *City of Phoenix v. Kolodziejski*, ... U.S.

....., 90 S.Ct. 1990 (1970). In both of those cases, unlike the situation here, bond issues were approved by the voters. In each case, citizens who were unconstitutionally denied the right to vote in such elections challenged the results. This Court determined that neither its *Cipriano* (395 U.S. at p. 706) nor its *Kolodziejski* (90 S.Ct. at pp. 1996-7 rulings would be given full retroactive effect. However, in each case, the Court applied its decision to cases brought within the time specified by state law for challenging the election. This presumably included the elections involved in the litigation before the Court in those cases, as well as other elections. The following statement by this Court in *Kolodziejski* emphasizes the necessity for granting the present cross-petition for a Writ of Certiorari in our present case:

> ". . . [I]n States with no definite challenge period, the validity of general obligation bonds that have been issued before this decision and prior to the commencement of an action challenging the issuance on the grounds sustained by this decision will not be affected by the decision in this case. *Since appellee in this case brought her constitutional challenge to the Phoenix election prior to the date of our decision in this case and no bonds have been issued pursuant to that election, our decision applies to the election involved in this case.* The District Court was therefore correct in holding that the June 10, 1969, bond election in Phoenix was constitutionally invalid and in enjoining the issuance of bonds pursuant to the approval obtained in that election." (90 S.Ct. at p. 1997.) (Emphasis added.)

Thus, the California Supreme Court should have applied its new ruling to the cross-petitioners herein. This

cross-petition for a Writ of Certiorari should, therefore, be granted in order for this Court to review and finally resolve the important issue of partial retrospective application of new rulings concerning voting rights.

CONCLUSION

For the foregoing reasons, respondents and cross-petitioners respectfully submit that the petition for a Writ of Certiorari should be denied, or in the alternative, that this present cross-petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
September 15, 1970.

Respectfully submitted,
JOSEPH L. ALIOTO,
PETER J. DONNICI,
By PETER J. DONNICI,
Attorneys for Elouise Westbrook, et al. Respondents and Cross-Petitioners.